
POLICE / PROSECUTOR UPDATE

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A very brief look at a few more legislative changes. P.L. 58-2003 amended **IC 35-48-4-8.3** and **IC 35-48-4-8.5**. It makes the knowing or intentional possession of drug paraphernalia a Class A misdemeanor (or a Class D felony for repeat offenses) and makes the reckless possession or sale of drug paraphernalia a Class B misdemeanor (or a Class D felony for repeat offenses).

P.L. 9-2003 amended **IC 35-46-3-11** and **IC 35-46-3-11.5**. Causing serious injury to or death of a law enforcement animal is a Class D felony. Interfering with or mistreating a service animal is now a Class A misdemeanor. Serious injury to or death of the service animal is a Class D felony. This public law added **IC 35-48-3-11.3**, making it a Class A misdemeanor to interfere with or mistreat a search and rescue dog. Serious injury to or death of the search and rescue dog is a Class D felony.

P.L. 123-2003 amended **IC 35-42-4-5(c)** to provide that a person commits performing sexual conduct in the presence of a minor if the person is 18 years old or older and (1) engages in sexual intercourse or (2) engages in deviate sexual conduct or (3) touches or fondles the person's own body in the presence of a child less than 14 years old with the intent to arouse or satisfy sexual desires. It is a Class D felony. It amended **IC 35-45-4-1** to make it public indecency, a Class A misdemeanor, for a person 18 or older to appear in a public place in a state of nudity with the intent to be seen by a child less than 16 years old. It is a Class D felony if the person has a prior unrelated conviction for public indecency. Finally, the public law added **IC 35-45-4-1.5**, creating the offenses of public nudity.

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It has been quite some time since we looked at the "operating" element of OWI. A recent case gives us the opportunity.

The defendant was waiting for his girlfriend to call his cell phone after he lost his way to her home. He bought some ice, cola, and rum. He parked his

car in a car dealership lot and drank the rum and cola until he passed out. As it was cold out, he had left his car running. A police officer observed the defendant slumped behind the steering wheel of his car. When the officer finally got the defendant to wake up, he asked the defendant to step out of the car. When he attempted to do so, the car rolled backward about 10 feet before stopping (the car had a manual transmission and was in neutral). When asked to step out again, the car again rolled backward some more before stopping. The defendant submitted to a breath test, which showed a BAC of .20. The defendant had not "operated" the car when he apparently applied the brake when the car rolled backward said the court of appeals.

There are 4 factors that can be used to determine whether a person operated or was in actual physical control of a vehicle: (1) whether or not the person in the vehicle was awake or asleep; (2) whether the motor was running; (3) the location of the vehicle and all of the circumstances bearing on how the vehicle arrived at that location; and (4) the intent of the person behind the steering wheel. In this case the defendant was asleep, though he was awakened by the officer. The motor was running but only to keep the defendant warm. He intended to remain where he was until his girlfriend picked him up. Most importantly, he only applied the brake to stop the car from rolling and did not intend to operate it.

Case: *Nichols v. State*, 783 N.E.2d 1210 (Ind. Ct. App. 2003).

